

EXHIBIT D

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

ePLUS, INC. : Civil Action No.
vs. : 3:09CV620
LAWSON SOFTWARE, INC. : July 28, 2010

COMPLETE TRANSCRIPT OF THE MOTIONS HEARING
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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PROCEEDINGS

00:22:38 2
00:22:39 3 THE CLERK: Civil action number 3:09CV00620, ePlus,
00:22:55 4 Inc., versus Lawson Software, Inc. Will counsel please state
00:29:23 5 their names for the record and identify the parties they
00:29:26 6 represent.
00:29:30 7 MR. MERRITT: Greg Merritt, Christian & Barton, for
00:29:33 8 ePlus.
00:29:35 9 MR. ROBERTSON: Scott Robertson, Goodwin Procter
00:29:36 10 firm. With me are my partners.
00:29:41 11 MR. STRAPP: Michael Strapp.
00:29:43 12 MS. ALBERT: Jennifer Albert.
00:29:47 13 MR. CARR: Dabney Carr, Troutman Sanders, for Lawson
00:29:50 14 Software.
00:29:51 15 MR. McDONALD: Good morning, Your Honor. Dan
00:29:53 16 McDonald, Merchant & Gould, representing Lawson Software, and
00:29:57 17 with me today, I'd like to introduce Kirstin Stoll-DeBell, also
00:30:02 18 with Merchant & Gould, also representing Lawson Software.
00:30:07 19 MS. STOLL-DeBELL: Good morning.
00:30:09 20 THE COURT: Morning. I always think it's a good idea
00:30:49 21 to throw counsel a curve ball. I always enjoyed it so much
00:30:58 22 when judges did it to me.
00:30:59 23 I've decided, upon further reflection, that I would
00:31:02 24 like to hear your views on the damages issue reflected in
00:31:08 25 Lawson's -- what is it, motion in limine number one? Is that

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00:31:19 1 what it is?
00:31:19 2 MR. McDONALD: That's one of them, Your Honor.
00:31:20 3 There's one, two, and three all related to the damages issue.
00:31:25 4 THE COURT: I mean the settlement.
00:31:27 5 MR. McDONALD: That's where you want to start?
00:31:30 6 THE COURT: No, we'll start with the motion for
00:31:32 7 summary judgment, but I would like somebody to -- I'd like for
00:31:36 8 you to address that. I don't want a lot of -- we don't have a
00:31:41 9 lot of time to do this, and we've got a lot to do, so get right
00:31:44 10 to the point. All right, the motion for summary judgment on
00:31:48 11 the written description.
00:31:51 12 MR. McDONALD: Thank you, Your Honor. May it please
00:31:55 13 the Court, I have some binders with PowerPoint slides I'd like
00:31:59 14 to hand up.
00:31:59 15 THE COURT: Is that a question of law or fact?
00:32:01 16 MR. McDONALD: It's a question of fact, but the facts
00:32:04 17 are undisputed. Can I hand up the binders?
00:32:25 18 THE COURT: I'm sorry, it's in paragraph four of what
00:32:29 19 is to be argued.
00:32:30 20 MR. McDONALD: That was just a fast ball, not a curve
00:32:34 21 ball.
00:32:35 22 THE COURT: I don't know. Maybe that was a slider.
00:32:38 23 All right.
00:32:40 24 MR. McDONALD: Is the PowerPoint visible on the
00:32:44 25 screen right now for Your Honor?

06:51:11 **1** because you said it doesn't have anything to do with
 06:51:14 **2** pre-filing. On the willful infringement issue, that's the only
 06:51:17 **3** issue it's relevant to; right?
 06:51:19 **4** MS. STOLL-DeBELL: Post-filing.
 06:51:20 **5** THE COURT: Okay. Now, how does it play out
 06:51:21 **6** post-filing? Tell me about that.
 06:51:23 **7** MS. STOLL-DeBELL: There is going to be evidence of
 06:51:25 **8** when they say Lawson started infringing these patents. They
 06:51:28 **9** have to put it on for their damages case, and we're talking
 06:51:31 **10** about which version they say infringed and when they say Lawson
 06:51:35 **11** started infringing.
 06:51:36 **12** So those are going to be facts that come into the
 06:51:39 **13** case. So the jury will hear about that, and it will be a fact
 06:51:43 **14** that these prior versions, anything before 8.0.3, does not
 06:51:48 **15** infringe. And we will have witnesses --
 06:51:51 **16** THE COURT: They're not going to prove that. They're
 06:51:54 **17** not going to offer that evidence -- are you, Mr. Robertson? He
 06:51:58 **18** said he wasn't.
 06:51:58 **19** MR. ROBERTSON: No. I'm going to prove that 8.0.3
 06:52:02 **20** and subsequent versions infringe.
 06:52:04 **21** THE COURT: But you're not going to say, in doing
 06:52:06 **22** that, earlier versions they had didn't infringe. That's not
 06:52:10 **23** going to be part of your case.
 06:52:11 **24** MR. ROBERTSON: Not going to be part of my case.
 06:52:13 **25** THE COURT: So now it comes in, you say, to deal with

06:52:18 **1** -- when it comes in as part of your case.
 06:52:21 **2** MS. STOLL-DeBELL: Well, yeah. I mean, at a minimum,
 06:52:23 **3** it's part of our cross-examination of Dr. Weaver, that he is
 06:52:26 **4** not asserting that these prior versions infringed, and he is
 06:52:30 **5** asserting --
 06:52:30 **6** THE COURT: I'm going to tell you what that's going
 06:52:32 **7** to come up with. That's going to come up with what you call an
 06:52:35 **8** objection, and it's going to be sustained most likely. You've
 06:52:43 **9** got to realize that you've got to try cases in the order that
 06:52:46 **10** the issues are presented.
 06:52:47 **11** Now, this is something that you need to raise, so the
 06:52:50 **12** question is, can you put in evidence probative of your state of
 06:52:56 **13** mind that when you got the lawsuit, you didn't think you were
 06:53:01 **14** infringing with the new 8.0.3 because it was just like all the
 06:53:08 **15** others and they didn't infringe.
 06:53:10 **16** MS. STOLL-DeBELL: Yes.
 06:53:14 **17** THE COURT: So you have to then, you say, offer proof
 06:53:18 **18** that those earlier ones didn't infringe in order to be able to
 06:53:21 **19** make that argument; right?
 06:53:23 **20** MS. STOLL-DeBELL: Right, but I think it's all tied
 06:53:25 **21** in to we don't think any of it infringes because it's all the
 06:53:29 **22** same thing. So it's -- you know, we don't think any of them
 06:53:34 **23** had catalogs.
 06:53:35 **24** THE COURT: What you're doing is thinking without
 06:53:37 **25** putting it in context of a piece of litigation. You're

06:53:43 **1** thinking the thing through as if logic dictated that these
 06:53:49 **2** things follow one unto the other. That isn't exactly how the
 06:53:53 **3** trial of the case works. We're looking at whether or not it's
 06:53:58 **4** probative in your case. All right. Anything else that you
 06:54:03 **5** wish to say on any of these things?
 06:54:06 **6** MS. STOLL-DeBELL: I don't think so, Your Honor.
 06:54:08 **7** THE COURT: Okay.
 06:54:10 **8** MR. ROBERTSON: One point on that last issue, Your
 06:54:13 **9** Honor.
 06:54:14 **10** THE COURT: Yes, since you have the burden on the
 06:54:15 **11** motion.
 06:54:17 **12** MR. ROBERTSON: If it's all the same and 8.0.3
 06:54:20 **13** doesn't infringe, they don't willfully infringe, what's the
 06:54:23 **14** relevance of 5.0 and 6.0?
 06:54:26 **15** THE COURT: Because they looked at 5.0 and 6.0 which
 06:54:31 **16** you didn't accuse of infringing, so they didn't think they were
 06:54:34 **17** infringing, and they thought you were all wet.
 06:54:37 **18** MR. ROBERTSON: If it hasn't changed, what they're
 06:54:39 **19** saying is then it's invalidated because it predates the
 06:54:41 **20** patents. If they're not infringing now, they're not willfully
 06:54:44 **21** infringing, it makes the relevance of 5.0 and 6.0 that they
 06:54:48 **22** didn't infringe even earlier pre-attenuated and marginal in my
 06:54:53 **23** view. Thank you.
 06:54:57 **24** THE COURT: This motion is going to be granted. This
 06:55:02 **25** report goes somewhat considerably off the reservation

06:55:11 **1** established by the previous orders of the Court beginning with
 06:55:20 **2** the requirements that contentions, invalidity contentions be
 06:55:25 **3** stated at a certain time, and then Lawson was given a second
 06:55:33 **4** bite at the apple and told to restate them, and those orders
 06:55:38 **5** were put in place in order that everybody would know how the
 06:55:43 **6** discovery was to proceed, what were the contentions, what are
 06:55:49 **7** the contentions, what do we then direct the discovery to.
 06:55:54 **8** They are not just pro forma requirements of throwing
 06:55:58 **9** up pieces of paper into the file that contain something about
 06:56:03 **10** invalidity. They shape -- they are the skeleton of the case to
 06:56:08 **11** which the flesh and muscles and viscera are attached by
 06:56:14 **12** discovery, and they mean something.
 06:56:21 **13** To the extent that Dr. Shamos's report talks about
 06:56:29 **14** infringement issues -- I mean invalidity issues or infringement
 06:56:34 **15** issues beyond what was disclosed, that evidence cannot be
 06:56:46 **16** brought in. It just simply can't.
 06:56:49 **17** When the validity contentions were filed in the
 06:56:54 **18** second supplement on the issue of anticipation, it was said
 06:56:58 **19** there were 14 claims that were infringed -- I mean anticipated.
 06:57:07 **20** J-Con had one. Gateway was three claims. PO Writer was seven
 06:57:15 **21** claims anticipated, and 542, King 542 anticipated three.
 06:57:24 **22** Dr. Shamos says for the first three, J-Con, Gateway,
 06:57:29 **23** and PO Writer, there were 13 each, and for King 542 there were
 06:57:34 **24** 11, there were 50. He can't testify to anything but to the 14.
 06:57:40 **25** That's been clear from the beginning.

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09:06:03 1 but at least it is irrelevant as to the method -- I mean as to
 09:06:08 2 the apparatus even in the acknowledgment of the defendant, and
 09:06:13 3 it is -- it is not cumulative evidence, it being the only
 09:06:19 4 actual system that shows the RQ in operation in the hands of
 09:06:25 5 the customer, and the prejudicial aspect, I think, that would
 09:06:28 6 arise from the missteps that the woman made can be cured by
 09:06:34 7 just letting the jury see the videotape and see how it works.
 09:06:39 8 But I'm going to instruct you both to review it carefully, and
 09:06:43 9 if what we've got is a comedy of errors, it's not going to come
 09:06:47 10 in because that's wasteful of the jury's time. So the motion
 09:06:52 11 will be provisionally denied.
 09:06:59 12 That leaves me with a few things to do; is that
 09:07:02 13 right? We don't have any more motions to argue; is that right?
 09:07:07 14 MR. McDONALD: That's correct, Your Honor. Your
 09:07:09 15 Honor, I wonder if I would have leave because I have a
 09:07:12 16 seven o'clock flight.
 09:07:13 17 THE COURT: Hit the road.
 09:07:15 18 MR. McDONALD: Thank you.
 09:07:17 19 THE COURT: You are cutting it close as it is.
 09:07:19 20 MR. McDONALD: I agree. Thank you, Your Honor.
 09:07:24 21 THE COURT: All right, Mr. McDonald is gone, but
 09:07:27 22 we're going to go. You all have a time to talk with Judge
 09:07:35 23 Dohnal?
 09:07:35 24 MR. ROBERTSON: August 19th.
 09:07:36 25 MR. CARR: Correct, Your Honor.

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09:07:38 1 THE COURT: August 19th. Both of you have some
 09:07:42 2 problems in the case, folks, problems that warrant a serious
 09:07:47 3 look at whether you're going to settle it or not, and I will
 09:07:53 4 say -- I wasn't saying this for settlement purposes. I
 09:07:58 5 genuinely believe that your damages case takes a hit for the
 09:08:03 6 reasons that I expressed, and I wasn't trying to communicate
 09:08:06 7 that for purposes of inviting you all to settle, but whereas
 09:08:12 8 here you have liability problems, and you might make sure you
 09:08:16 9 communicate this to Mr. McDonald, and you do, I think, have
 09:08:20 10 some liability problems, and they have damage problems.
 09:08:24 11 That usually provides a reasonably efficacious way in
 09:08:29 12 which to try to reach an accommodation that businesspeople can
 09:08:33 13 live with. All right? Thank you. We will be in adjournment.
 14
 15 (End of proceedings.)
 16
 17
 18 I certify that the foregoing is a correct transcript
 19 from the record of proceedings in the above-entitled matter.
 20
 21
 22 /s/
 23 F. E. Peterson, RPR Date
 24
 25